Case No. 16-56666

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEVE CHAMBERS; et al.,

Plaintiffs - Appellees,

v.

CHRISTINE KNOTT

Objector - Appellant

v.

WHIRLPOOL CORPORATION, et al.,

Defendants - Appellees

Appeal from The United States District Court
For the Central District of California
Case No. 8:11-cv-01733-FMO-JCG
The Honorable Fernando M. Olguin, Presiding

APPELLANT CHRISTINE KNOTT'S REPLY IN SUPPORT OF MOTION FOR SUMMARY REVERSAL

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Introduction

As explained in Appellant's motion for summary reversal, the district court committed clear error by failing to apply the Class Action Fairness Act ("CAFA") to a settlement which provides only coupons to the overwhelming majority of the class. *See In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1175-76 (9th Cir. 2013); *True v. Am. Honda Motor Co.,* 749 F.Supp.2d 1052, 1069 (C.D. Cal. 2010). The result is a $15 million windfall to class counsel, far exceeding the actual value of the benefit to the class.[1]

This is the very result CAFA was intended to avoid. The fee award must be reversed for the district court to recalculate under CAFA, taking into account the redemption value of the coupons.[2] While the final figures are uncertain, class counsels' fees and costs after application of CAFA should be closer to $2-$3 million, and nowhere approaching the $15 million awarded.[3]

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[1] Defendants' Opposition to Plaintiffs' Motion for Attorneys' Fees, Costs, and Service Awards, Dkt. 246, at 15 (estimating the actual settlement value between $4.2 million and $6.8 million).

[2] *HP Inkjet.*, 716 F.3d at 1175-76 ("When a settlement provides for coupon relief, either in whole or in part, any attorney's fee 'that is attributable to the award of coupons' must be calculated using the redemption value of the coupons. § 1712(a). Since the district court awarded fees that were 'attributable to' the coupon relief, but failed to first calculate the redemption value of those coupons, we reverse the orders of the district court and remand for further proceedings consistent with this opinion.").

[3] Defendants' Opposition to Plaintiffs' Motion for Attorneys' Fees, Costs, and Service Awards, Dkt. 246, at 54.

I. Whirlpool Agrees that the Fee Award is Grossly Excessive and Contrary to Existing Law.

Whirlpool "agree[s] that the attorneys' fees awarded below greatly exceeded anything permitted by the applicable legal authorities and the factual record[.]"[4] The only thing left to do, in the interest of judicial economy, is summarily reverse the excessive fee award and remand to the district court.

This Court should not defer ruling so Whirlpool can make additional arguments for reversal. Whirlpool's arguments are limited to fees.[5] Like Appellant Knott, Whirlpool urged before the district court that $15 million was grossly excessive, CAFA applies, and it requires a substantial reduction.[6] Indulging full briefing for Whirlpool to articulate overlapping arguments that require the same relief will only cause unnecessary delay and expense.

Whirlpool speculates that "it is possible that one or more of the [two other] objectors may challenge not just the fee award but also the district court's grant of settlement approval."[7] Yet, both objections echo the arguments articulated in Appellant Knott's motion for summary reversal; both focus primarily on the excessiveness of class counsels' fees.[8]

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[4] Whirlpool's Response to Motion for Summary Reversal, at 1.

[5] *See* Mediation Questionnaire of Appellants Sears Holdings Corporation, Sears Roebuck and Co., Inc and Whirlpool Corporation Mediation, 16-56684, at 1-2. Regardless, Whirlpool did not contest the district court's order approving the settlement (to which it was a party), and thus cannot be heard to complain on appeal that the district court improperly approved the settlement.

[6] *See* Defendants' Opposition to Plaintiffs' Motion for Attorneys' Fees, Costs, and Service Awards, ECF Doc. 246, *passim*.

[7] Whirlpool's Response to Motion for Summary Reversal, at 2-3.

Nor should the issue of consolidation be an impediment to summary reversal. This issue is present in every appeal. If the district court committed clear error in failing to apply CAFA, then it failed to do so in each of the appeals.

II. Class Counsels' Response does Nothing to Diminish Appellant's Right to Summary Reversal.

Appellant's motion established clear error in the district court's failure to apply CAFA and the resulting $15 million windfall. *See* 9th Cir. R. 3-6 (providing for summary reversal based on "clear error" that "requires reversal or vacation of the judgment or order appealed from or a remand for additional proceedings").

As anticipated, Class counsels' approach to the affront on their fees is to shoot the messenger. Yet, *ad hominem* attacks on Appellant's attorneys are not legal argument. Similarly, class counsels' ability to confuse Ms. Knott, a lay witness, concerning their lodestar[9] is not a basis to deny summary reversal.

Class counsel largely gloss over the merits, citing a total of *three opinions* and neglecting to distinguish authority cited by Appellant. They do not dispute that the rebates offered in the class action settlement are coupons.

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[8] *See e.g.*, Objection of George Liacopoulos, ECF Doc. 235, *passim*; Objection of W. Allen McDonald (stricken by the district court), ECF Doc.236, *passim*.

[9] Class counsel neglect to include the citation to excerpts from Ms. Knott's deposition referenced in the district court's order, which is Dkt. 270-1, Excerpts of Deposition of Christine Knott, at 76-77. *See* Exhibit 1 to Motion for Summary Reversal, Order Approving Settlement and Awarding Fees, ECF Doc. 351, at 14.

Instead, while maintaining Appellant misrepresented the district court's analysis, class counsel suggest the court actually applied CAFA.[10] To be certain, ***it did not.***

In the court's words, it was "not convinced that CAFA governs attorney's fees in this case."[11] The court found that California law, and not CAFA, governs fee calculation here.[12] It also determined the parties contractually agreed CAFA would not apply.[13] Neither of these positions, as Appellant explained in her motion for summary reversal, is legally tenable.[14] Class counsel offer no response.

The district court did remark, erroneously, that "even *assuming* CAFA did apply,"[15] the lodestar method could be applied across the board, including to attorneys' fees based on coupon relief.[16] In fact, CAFA requires that "[w]hen a settlement provides for coupon relief, either in whole or in part, any attorney's fee 'that is attributable to the award of coupons' must be calculated using the redemption value of the coupons." *HP Inkjet Printer Litig.*, 716 F.3d at 1175-76.

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[10] Plaintiffs-Appellees' Opposition, at 1-2.

[11] Exhibit 1, Order Approving Settlement, Dkt. 351, at 18.

[12] *Id.*

[13] *Id.*

[14] *See* Motion for Summary Reversal, at 14-15.

[15] Exhibit 1 to Motion for Summary Reversal, Order Approving Settlement, Dkt. 351, at 18 (emphasis added).

[16] *Id.* at 19-20. Neither opinion cited by the court suggests that a court may use the lodestar method to calculate a portion of fees based on coupon relief. *See HP Inkjet*, 716 F.3d at 1185 ("[t]he above-quoted passage makes clear that CAFA only permits district courts to award lodestar fees when those fees are "not based on the value of the coupons"); *Davis v. Cole Haan, Inc.*, C 11-01826 JSW, 2013 WL 5718452, at *2 (N.D. Cal. Oct. 21, 2013). Appellant pointed this out in her motion for summary reversal. Motion, at 8 n. 35. Class counsel offer no response.

Because the vast majority of the settlement benefit here is coupons, it follows that the majority of the fee award is attributable to coupons. The district court was required to calculate fees attributable to coupons based on the redemption value. *Id.*[17]

Of course, the fact that class counsel and the district court say this is not a "coupon" settlement does not make it so. While the settlement offers various forms of relief, the district court did not dispute that "more than 99.8% of the Class is eligible to make a claim for only a coupon."[18] Cash is only available to class members who sustained an overheating event and filed a valid claim for reimbursement. Overheating events are rare, meaning more than 90% of the class will be entitled to coupons only, not cash.[19]

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[17] *Davis v. Cole Haan, Inc.*, C 11-01826 JSW, 2013 WL 5718452, at *3 (N.D. Cal. Oct. 21, 2013) (finding CAFA applied when "the practical reality is that almost the entire class will be receiving an undisputed coupon" and "[a]ccordingly, the Court cannot award the requested lodestar amount"); *Rougvie v. Ascena Retail Group, Inc.*, CV 15-724, 2016 WL 4111320, at *1 (E.D. Pa. July 29, 2016)(applying CAFA to a settlement that provided cash, but paid over 95% of the settlement through *de facto* coupons; not applying the lodestar method across the board). Despite class counsels' suggestion to the contrary, Appellant's motion does not dispute that the court did anything other than award fees under the lodestar method. Plaintiffs-Appellees' Opposition, at 2. Indeed, the court's application of the lodestar method across the board, even to fees attributable to coupons in violation of CAFA, was the centerpiece of Appellant's motion. Motion for Summary Reversal, at 2, 8, 10, 12, 16. Further, as noted in the motion for summary reversal, by taking CAFA out of the equation, class counsel were also able to make the $15 million more palatable to the court by inflating the value of the settlement based on its maximum potential value. *Id.* at 4.

[18] Exhibit 1, Order Approving Settlement, Dkt. 351, at 20 (emphasis original). Appellant did not "portray the settlement as a pure coupon settlement" as claimed by class counsel. Opposition, at 4. Rather, Appellant noted that, despite various benefits offered to the class, the vast majority of the class will be eligible for only coupons. Motion for Summary Reversal, at 1.

[19] Defendants' Opposition to Motion for Attorneys' Fees, Dkt. 246, at 12-14 ("[b]ecause cash benefits are available only to those Class Members who already experienced or who will in the future experience an Overheating Event, and because all available data shows that far less than 0.2% of all Class Members will experience an Overheating Event, more than 99.8% of Class Members are entitled to make a claim only for a rebate (i.e., a coupon).").

The settlement data available to date confirms that the primary relief is rebates, not cash. The administrator received 133,040 claims; of which 122,294, or 91.9%, requested a rebate form.[20]

Because the primary benefit of the settlement is coupon relief, the district court had no choice but to apply CAFA. The case should be remanded for it to do so.

Class counsel claim that "[t]he rebate program . . . will not be complete for at least 8 more months." Yet, according to the settlement agreement, the rebate period expired on October 25, 2016 (120 days after the claims deadline of June 27, 2016[21]), the date by which class members had "to mail or email to the Settlement Administrator or the Rebate Vendor their completed rebate form and proof of purchase."[22]

The district court should now be able to calculate the attorneys' fees based on the value of the coupons actually redeemed. To the extent it cannot yet do so, fees should be reversed and remanded with instructions that the district court award the portion of fees that can be determined under CAFA, and wait until the necessary data is available to award the remainder.[23]

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[20] Supplemental Declaration of Patrick M. Passarella, Dkt. 254-6, at 5-6.

[21] Defendants' Opposition to Motion for Attorneys' Fees, ECF Doc. 246, at 15 (noting the deadline for filing claims was June 27, 2016).

[22] Settlement Agreement, ECF Doc. 192-4, at 22.

[23] *See e.g., HP Inkjet*, 716 F.3d at 1186 n.19 ("a fees award can be bifurcated or staggered to take into account the speculative nature of at least a portion of a class recovery"); *Rougvie*, 2016 WL 4111320, at *38 (awarding class counsel fees based on the known cash benefit, and allowing class counsel to return and apply for fees based on coupon benefits "under a percentage of recovery method based on the redeemed vouchers").

Conclusion

There is no reason for this Court to delay. Summary reversal should be granted so that the district court can enter a fee in compliance with CAFA. Accordingly, for the reasons set forth in Appellant's motion for summary reversal and the reasons stated herein, Appellant respectfully requests that this Court grant her motion for summary reversal.

Dated: December 14, 2016

Respectfully submitted,

By: */s/ Robert Clore*

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CERTIFICATE OF SERVICE

I hereby certify that on this the 14th day of December, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system thus effectuating service of such filing all ECF registered attorneys in this case.

/s/ Robert Clore
Robert Clore